FILE COPY

APR 9 1943

No. 593

In the Supreme Court of the United States

OCTOBER TERM, 1942

DIRECT SALES COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Summary of argument	20
Argument:	
I. There was sufficient evidence to warrant the jury in finding that petitioner and Dr. Tate were guilty of conspiracy	22
II. The trial judge clearly did not, in his instructions to the jury, create the impression that the jury had to convict petitioner if they convicted Dr. Tate	42
Conclusion	44
Appendix	45

CITATIONS

Cases:

Abrams v. *United States*, 250 U. S. 616	30, 36
Allen v. *United States*, 4 F. (2d) 688, certiorari denied, *sub nom. Hunter* v. *United States*, 267 U. S. 597	30
Backun v. *United States*, 112 F. (2d) 635	38
Bannon and Mulkey v. *United States*, 156 U. S. 464	29
Beland v. *United States*, 100 F. (2d) 289, certiorari denied, 306 U. S. 638	28, 31
Berger v. *United States*, 295 U. S. 78	28
Booth v. *United States*, 57 F. (2d) 192	31
Braverman v. *United States*, 125 F. (2d) 283, reversed on other grounds, 317 U. S. 49	28, 29, 30, 41
Breese v. *United States*, 203 Fed. 824	28
Brown v. *Elliott*, 225 U. S. 392	20
Casey v. *United States*, 276 U. S. 413	37
Craig v. *United States*, 81 F. (2d) 816, certiorari denied, 298 U. S. 690	30
Healy v. *United States*, 152 U. S. 539	29
Degnan v. *United States*, 271 Fed. 291	43
Di Bonaventura v. *United States*, 15 F. (2d) 494	36
Eckert v. *United States*, 7 F. (2d) 257	41
Eley v. *United States*, 117 F. (2d) 526	30

Cases—Continued. Page

Ford v. *United States*, 273 U. S. 593 29
Friedman v. *United States*, 260 Fed. 388, certiorari denied, 250 U. S. 671 ..... 37, 38, 41, 42
Frohwerk v. *United States*, 249 U. S. 204 ..... 29, 36
Gebardi v. *United States*, 287 U. S. 112 28
Glasser v. *United States*, 315 U. S. 60 31
Heller v. *United States*, 104 F. (2d) 446 42
Hogan v. *O'Neill*, 255 U. S. 52 28
Hyde v. *Shine*, 199 U. S. 62 29
Hyde v. *United States*, 225 U. S. 347 29
Interstate Circuit v. *United States*, 306 U. S. 208 29
Jezewski v. *United States*, 13 F. (2d) 506, certiorari denied, 273 U. S. 735 30
Jin Fuey Moy v. *United States*, 254 U. S. 189 ..... 37, 41, 42
Kaufmann v. *United States*, 282 Fed. 776, certiorari denied, 260 U. S. 735 43
Kopald-Quinn & Co v. *United States*, 101 F. (2d) 628, certiorari denied, *sub nom. Reebaum* v. *United States*, 307 U. S. 628 28
Laska v. *United States*, 82 F. (2d) 672, certiorari denied, 298 U. S. 689 31
Lefco v. *United States*, 74 F. (2d) 66 31
Linder v. *United States*, 268 U. S. 5 ..... 37, 40, 41, 42
Marino v. *United States*, 91 F. (2d) 691, certiorari denied, *sub nom. Gullo* v. *United States*, 302 U. S. 764 ..... 28, 29–30
Martin v. *United States*, 100 F. (2d) 490, certiorari denied, 306 U. S. 649 28
Middleton v. *United States*, 49 F. (2d) 538 30
Morrison v. *California*, 291 U. S. 82 30
Oliver v. *United States*, 121 F. (2d) 245, certiorari denied, 314 U. S. 696 31
Pettibone v. *United States*, 148 U. S. 197 29
Pierce v. *United States*, 252 U. S. 239 30
Pierce v. *United States*, 314 U. S. 306 28
Ratigan v. *United States*, 88 F. (2d) 919, 301 U. S. 705 .....
Saunders v. *United States*, 260 Fed. 386 41
Schefano v. *United States*, 84 F. (2d) 513 28
Short v. *United States*, 91 F. (2d) 614 31
Snow, In re, 120 U. S. 274 29
United States v. *Anderson*, 101 F. (2d) 325, certiorari denied, 307 U. S. 625 31
United States v. *Balint*, 258 U. S. 250 40
United States v. *Behrman*, 258 U. S. 280 ..... 9, 37, 41
United States v. *Borden Co.*, 308 U. S. 188 29
United States v. *Britton*, 108 U. S. 199 29
United States v. *Cusimano*, 123 F. (2d) 611 36
United States v. *Dillaro*, 99 F. (2d) 783 36
United States v. *Doremus*, 249 U. S. 86 40

Cases—Continued. Page

United States v. *Falcone*, 311 U. S. 205 ..... 20, 21, 23, 24, 27, 28, 38
United States v. *Feinberg*, 123 F. (2d) 425, certiorari denied, 315 U. S. 801 30
United States v. *Harrison*, 121 F. (2d) 930, certiorari denied, 314 U. S. 661 ..... 29, 36, 38
United States v. *Hirsch*, 100 U. S. 33 29
United States v. *Jin Fuey Moy*, 241 U. S. 394 40
United States v. *Joseph Fleming & Son*, 251 Fed. 932 41
United States v. *Kissel*, 218 U. S. 601 29
United States v. *Manton*, 107 F. (2d) 834, certiorari denied, 309 U. S. 664 ..... 28, 29
United States v. *Masonite Corp.*, 316 U. S. 265 ..... 30, 36
United States v. *McCann*, 32 F. (2d) 540, certiorari denied, 280 U. S. 559 43
United States v. *Pandolfo*, 110 F. (2d) 736, certiorari denied, 310 U. S. 651 36
United States v. *Patten*, 226 U. S. 525 ..... 30, 36
United States v. *Pecoraro*, 115 F. (2d) 245, certiorari denied, 312 U. S. 685 ..... 36, 39
United States v. *Rabinowich*, 238 U. S. 78 28
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 ..... 28, 40
Viereck v. *United States*, No. 458, present term, decided by this Court March 1, 1943 28
Webb v. *United States*, 249 U. S. 96 ..... 37, 41, 42
Wilder v. *United States*, 100 F. (2d) 177 31
Williams v. *North Carolina*, No. 29, present term, decided by this Court Dec. 21, 1942 28
Williamson v. *United States*, 207 U. S. 425 ..... 29, 30
Wong Tai v. *United States*, 273 U. S. 77 28
Wyatt v. *United States*, 23 F. (2d) 791, certiorari denied, 277 U. S. 588 30
Yee Hem v. *United States*, 268 U. S. 178 37
Zito v. *United States*, 64 F. (2d) 772 ..... 30, 36
Zottarelli v. *United States*, 20 F. (2d) 795, certiorari denied, 275 U. S. 571 30

Statutes and Codes:

Criminal Code, Section 37 (18 U. S. C. 88) 45
Harrison Narcotic Act, as amended, Secs. 1 & 2 ..... 40, 45, 48
Internal Revenue Code:
Section 2553 ..... 3, 47
Section 2554 ..... 3, 48
Section 2555 51
Section 2557 52
Section 3220 ..... 3, 45
Section 3221 46
Section 3224 ..... 3, 46
Section 3228 46

Miscellaneous: Page.

Bureau of the Census, *Sixteenth Census Reports on Population*, Vol. I, p. 982 6

United States Treasury Department, Bureau of Narcotics, Washington, D. C., *Traffic in Opium and Other Dangerous Drugs for the Years Ended December 31, 1939, 1940 and 1941*, published pursuant to the requirements of the Act of June 14, 1930 ..... 32, 33, 38

89 U. of Pa. L. Rev. 624 31

48 Yale Law Journal 1447 31

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 593

DIRECT SALES COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 21–32) overruling petitioner's plea in abatement and demurrer to the indictment (R. 16–20; 20–21) is reported at 40 F. Supp. 917, and its opinion (R. 242–252) overruling motions for a new trial and for arrest of judgment (R. 240–241) is reported at 44 F. Supp. 623. The opinion of the circuit court of appeals (R. 266–269) is reported at 131 F. (2d) 835.

JURISDICTION

The judgment of the circuit court of appeals was entered November 13, 1942 (R. 269–270). The peti-

tion for a writ of certiorari was filed December 18, 1942, and was granted March 1, 1943 (R. 270). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Was the evidence sufficient to warrant the submission to the jury of the issue whether petitioner was a conspirator?

2. Did the trial court's instructions erroneously give the jury the impression that they had to convict petitioner if they convicted Dr. Tate?

STATUTES INVOLVED

The pertinent statutory provisions are copied in the Appendix at pp. 45–53, *infra*.

STATEMENT

On May 26, 1941, a single count indictment was returned in the District Court for the Western District of South Carolina charging petitioner and Dr. John V. Tate, George C. Johnson, Clyde A. Foster, and Reel B. Black with a conspiracy, in violation of Section 37 of the Criminal Code (Appendix, *infra*, p. 45) (R. 1–10). The indictment alleged that from May 1, 1933, to June 10, 1940, at Calhoun Falls, South Carolina, the defendants conspired to defraud the United States of its revenues under the Harrison Narcotic Act, as amended, and

to commit offenses against the United States by violating the provisions of that Act interdicting the obtaining of drugs by means of official order forms for unlawful purposes, the disposition of drugs so obtained without having registered in an appropriate classification and without having paid the prescribed special taxes, and the distribution of drugs except in or from the original stamped packages and except in pursuance of official order forms (see I. R. C. §§ 2553 (a), 2554 (a) and (g), 3220, 3224 (a), Appendix, *infra*, pp. 45–50).[1]

The *modus operandi* of the conspiracy was alleged to be as follows: Petitioner at frequent intervals throughout the period of the conspiracy, by means of circulars, catalogues, and other advertising matter, would, and did, induce Dr. Tate to obtain large quantities of morphine sulphate, with knowledge that Dr. Tate was obtaining these drugs for use other than in the legitimate practice of his profession; that Dr. Tate would thereupon sell large quantities of the drugs, without official order forms and not in or from the original stamped packages, to the defendants Johnson, Foster, and Black and to others unknown to the grand jury,

[1] It was averred in the indictment that the petitioner was registered under the Harrison Narcotic Act, as amended, as a manufacturer of and wholesale dealer in opium, its salts and derivatives, including sulphates (R. 1), that Dr. Tate is a physician who is registered under the Act in his proper class (R. 1–2), and that Johnson, Foster, and Black had not registered or paid the special tax in any class under the Act.

for the purpose of enabling such persons to satisfy their addiction to the drugs, and in turn, to sell them to other persons unlawfully, which they did (R. 2–3).

Fifty-three overt acts were alleged to have been committed in furtherance of the conspiracy (R. 3–9).[2]

The defendants Johnson and Black pleaded guilty (R. 33). During the ensuing trial the defendant Foster suffered a heart attack and by consent of all counsel his case was withdrawn from the jury's consideration (R. 145, 242). The trial proceeded as to petitioner and Dr. Tate (*ibid.*).[3]

---

[2] One of the overt acts was the sending by petitioner to Dr. Tate at frequent intervals during the seven-year period covered by the conspiracy of catalogues, price lists, and other advertising matter which held out to Dr. Tate the inducement to buy, by means of official order forms, morphine sulphate and morphine sulphate tablets in large quantities by reason of the discounts offered for the purchase of such quantities (R. 3–4). Twenty-three of the overt acts were sales by petitioner to Dr. Tate of one-half grain morphine sulphate tablets in lots of 1,000, ranging over a period from November 26, 1937, to November 27, 1939 (R. 4–6). Twenty-four of the overt acts consisted of sales by Dr. Tate from June 16, 1939, to January 19, 1940, of one-half grain morphine sulphate tablets to various named individuals, including the defendant Johnson. Four of the overt acts were sales of one-half grain morphine sulphate tablets, without the required official order forms, by the defendant Johnson to the defendants Foster and Black, and one a sale by the defendant Foster to the defendant Black. These sales occurred in September 1939 (R. 9).

[3] Dr. Tate had previously pleaded guilty in October 1940 to an indictment in four counts charging him with making

The evidence may be thus summarized:

Petitioner is a New York corporation which has its principal place of business in Buffalo (R. 1, 33) and conducts a general physicians' supply and drug mail-order business. It is the largest of the seven such businesses in the country (R. 201, 202, 203; see also R. 89, 114). It has registered annually as a manufacturer and wholesale dealer in opium, its salts and derivatives, pursuant to the Harrison Act, and has paid the prescribed special tax for those classes (R. 1, 33, 41, 202). Its total annual sales between 1935 or 1936 and 1940 were between $300,000 and $350,000 (R. 202), of which the narcotic trade represented about 15 percent in dollar volume, although but 2½ percent in unit volume (R. 202–203, 214). It solicits orders through its catalogues and leaflets which it sends out about every ten days to 14,400 physicians throughout the United States (R. 139, 188, 201, 214). It has no salesmen, retailmen or middlemen (R. 201, 203; see also R. 114). Most of its business is with doctors in the small towns rather than the large cities (R. 218).

---

sales to Ruby Lamar, an informer, and Albert P. Rogers, a narcotic agent (R. 34, 42, 49–53, 84, 94–95). At least two of the sales were alleged as overt acts in the conspiracy indictment in this case (R. 84, 95–96). While Dr. Tate was summoned and testified as a witness for the Government at the trial below, after consultation with counsel he pleaded not guilty to the conspiracy charge and maintained that he was guilty only of the substantive offenses of sales to individuals (R. 96–97).

520291—43——2

Dr. Tate is a physician who practiced his profession at Calhoun Falls, South Carolina (R. 84), a place which in 1940 had a population of 1,832 (*Sixteenth Census Reports on Population*, Vol. I, p. 982). He was registered as a physician under the Harrison Narcotic Act (R. 85, 94), and, of course, paid only the special tax prescribed for that class. He was entitled to purchase morphine sulphate, a derivative of opium (R. 36), for professional purposes only, by using official order forms furnished by the Collector of Internal Revenue (R. 85). He had been buying drugs from the petitioner for ten or fifteen years (R. 86), and during the period covered by the indictment purchased the major portion of his morphine sulphate from petitioner, on official order forms (R. 85; see also R. 51). In 1939 he was purchasing one-half grain morphine sulphate tablets at a price slightly under $1.50 per hundred (Govt. Ex. No. 1;* see also R. 81–82, 83). In that year, Dr. Tate admitted (R. 90–91, 95–96) and other evidence showed (R. 39–40, 43–44, 45–46, 48, 49, 50, 52, 58–59, 61–62, 64–65, 77), he sold on numerous occasions morphine sulphate to those who were addicts or posed as such. At times these sales were made in bottles containing petitioner's labels (R. 39–40, 52, 62, 63, 65, 77; see also R. 64). Purchases from Dr. Tate were made at frequent intervals by the same persons. The defendant

*This exhibit is not printed in the record but is on file, together with the other original exhibits, in the office of the Clerk of this Court.

Johnson, for example, purchased regularly, once or twice a week (R. 39–40, 61–62, 64, 65, 76–77). On one occasion Dr. Tate told a purchaser that "he was entirely out but he ordered once a week and he would put me on his order. He said his orders were rather heavy because he had some patients that used a considerable amount of the stuff." The purchaser was told to come back "on Saturday week" (R. 45; see also, as to a similar instance, R. 50). It appears that a price ranging from $4 to $8 a hundred was charged by Dr. Tate for one-half grain tablets (R. 45, 50, 53); the doctor explained to one purchaser that the mounting price was due to the war (R. 50). The defendant Johnson, an addict at the time of his purchases from Dr. Tate, was a supplier for other addicts, including the defendants Foster and Black, Foster paying as high as $25 a hundred for one-half grain tablets (R. 65). Black in turn supplied another addict. On one occasion two other addicts accompanied the purchaser to the doctor's office (R. 60, 62, 63, 65, 66, 75, 79).

Petitioner's sales to Dr. Tate were made under the following circumstances:

Dr. Tate received a catalogue or small bulletin from petitioner approximately every ten days from 1933 to 1940 (R. 89, 201, 214). Until the middle of September 1936 the catalogue listed morphine sulphate in quantities of 5,000, 1,000, and 500 tablets, whereas other drug companies listed it in quantities

not to exceed 100 tablets (Govt. Ex. No. 9; R. 124, 126, 198).[5] Until the latter part of 1939 or the beginning of 1940, if not later, the catalogue also offered on purchases of morphine sulphate discounts of 50 percent and an additional 10 percent (R. 201, 209, 215; cf. Govt. Ex. No. 18, R. 155), these prices being 30 to 40 percent lower than those of other wholesalers (R. 89, 111, 113; see also R. 204), which Dr. Tate testified was the main reason he bought from petitioner (R. 111). Dr. Tate's morphine sulphate purchases from petitioner began in a small way in November 1933 (Govt. Exs. Nos. 2, 11), but in the less than six months period from January 6, 1936, to June 19, 1936, he ordered and received 6,700 one-half grain tablets of morphine sulphate from petitioner on official order forms, the orders being placed, mostly, about twice a month (Def. Ex. No. 4; R. 135–136; cf. R. 40–41).

In August 1936 Narcotic Agent Bransky, at petitioner's plant, interviewed Joseph H. Dotterweich, who was petitioner's president, and George Dotterweich, who was then chairman of the board and treasurer but who succeeded his brother, Joseph, as president about September 1, 1936 (R. 119, 197). Bransky told both men that he had been directed to come there by the Commissioner of Narcotics at Washington, D. C. (R. 119), and that he "was there due to large quantities of drugs

[5] Petitioner did, however, sell in lots of less than 500 (R. 129). For 100 tablets the price was one-tenth of that for a thousand, plus ten cents (R. 159, Govt. Ex. No. 7).

which they had been selling to various registrants throughout the United States which had been diverted," and "asked their cooperation to curb this."[6] The two brothers stated that they "didn't desire any test case of the matter" and that "we only sell these narcotic drugs on order forms submitted by registrants * * * and had no way of knowing what disposition was being made of these drugs by the registrants." Bransky then told them that his experience as a narcotic officer[7] had taught him that when a physician ordered *one-half grain* tablets of morphine sulphate it could be assumed that they were to be used to satisfy addiction or other than for legitimate medical purposes (R. 120);[8] also that it had been his experience as an investigator that the average physician throughout the United States

---

[6] Bransky's investigation at petitioner's plant covered a period of some six weeks, although he was not there every day (R. 120, 131–133).

[7] Bransky had been a narcotic inspector for twenty-four years, was a doctor of pharmacy and, as a pharmacist during his early years, had filled numerous prescriptions by doctors for narcotics (R. 115, 117–118).

[8] Morphine sulphate, which is, of course, a habit-forming drug (R. 163), is manufactured in one-eighth, one-fourth, and one-half grain tablets (R. 36). There was expert testimony that the practice in the profession is to give one-eighth or one-fourth grain doses and that only in a rare case is a half grain administered to a patient (R. 37, 38, 162; see R. 118). In *United States* v. *Behrman*, 258 U. S. 280, 289, it is stated that "As shown by Woods, *United States Dispensatory*, a standard work in general use, the ordinary dose of morphine is one-fifth of a grain * * *."

would order 200 to 400 *one-fourth* grain tablets of morphine sulphate in a year and if a doctor ordered a larger amount that it was reasonable to assume that he was purchasing the drug for illegitimate uses (R. 120, 134–135, cf. 205, 207–208).[9] He also submitted to them a list, in the form of a letter by him to Joseph Dotterweich, containing the names of 204 physicians who had been convicted of flagrant violations of the federal narcotics law (Govt. Ex. No. 5; R. 121, 122, 123; Def. Ex. No. 6). After examining petitioner's records Bransky advised Joseph Dotterweich that 55 of these 204 physicians had accounts with petitioner (R. 122–123, 140). Bransky was told that "they would cooperate and not send those drugs to those registrants named on that black list" (R. 123). Supplemental lists were submitted from time to time (see *e. g.*, Govt. Ex. No. 6; R. 123).

In the middle of September 1936 Bransky advised George Dotterweich, who was then petitioner's president, that he had examined the catalogues of various drug houses, such as Sharpe & Dohme, Eli Lilly, and Parke-Davis, and that they listed morphine sulphate only in quantities not to exceed

[9] Codein, which is also manufactured in one-eighth, one-fourth, and one-half grain tablets, may be used for the same purposes as morphine sulphate. Although a narcotic, it is very much milder in effect than morphine. One doctor testified that he used 100 doses of codein to one of morphine (R. 164–165). During the period from January 6, 1934, to May 24, 1940, Dr. Tate's order forms showed no purchases of codein from petitioner (Govt. Ex. No. 11; R. 170–171, 218).

100 tablets, whereas "Direct Sales Company had been listing 500,[10] 1,000, and 5,000,"[11] to which George Dotterweich replied, "Oh, I know that" (R. 124). Following further discussions and the preparation of a tentative list limiting single orders by physicians to a maximum of 1,000 tablets (R. 152; Def. Ex. No. 14), the Commissioner of Narcotics on October 20, 1936, wrote petitioner a letter which, in part, stated that "In connection with its policy of restricting the distribution and use of narcotics to legitimate medical purposes, the Bureau is soliciting the active cooperation of manufacturers and wholesale dealers to the end that drugs will not be furnished to practitioners who are known to have been dispensing or selling such drugs for other than legitimate medical purposes, and to the further end that such drugs will not be furnished in any case in excessive quantities," and suggested that "no physician or other practitioner be supplied in excess of 1,000 one-half grain tablets or their equivalent in tablets of other size * * *." Acknowledgment of the letter was requested (Def. Ex. No. 20; R. 159, 160). Petitioner's president, George Dotterweich, admitted that he saw this letter (R. 209), and on October 24, 1936, petitioner, in a letter to the Com-

---

[10] It will be noted that this quantity, the minimum listed by petitioner, is more than the average physician would order, even at quarter-grain strength, in an entire year (*supra*, p. 10).

[11] These quantities were listed in one-fourth, one-half grain, and various other strengths (R. 126).

missioner from its office manager, advised that "we will cooperate with you in every way" (Def. Ex. No. 20). At the time of Bransky's interview, if not before, and from then on, George Dotterweich, it is clear, fixed petitioner's policies, was in charge all the time, subjected the employees to his direction, and gave strict attention to the business of petitioner (R. 193, 208–209).

Pursuant to Bransky's suggestion petitioner took steps to insure that no further narcotics would be shipped to doctors whose names appeared on the "black list" of those convicted for violating the narcotic laws (R. 123, 139, 155, 156, 188; Def. Ex. No. 22), revised its catalogue by eliminating its quotation of morphine sulphate tablets in lots of 5,000, listing them instead in lots of 1,000 and 500 tablets (R. 124, 126–127, 129–131, 198–199; Govt. Exs. 9, 10), and, so far as appears from the record, petitioner at no time thereafter shipped to Dr. Tate or any other physician more than 1,000 tablets on a single order form. (See R. 199–200, 210.)

But, despite this appearance of cooperation with the Narcotic Bureau, petitioner continued to honor orders from Dr. Tate for 1,000 one-half grain lots which, at first, came in with the same degree of regularity as they had prior to Bransky's discussions with its officers, and later with progressively increasing frequency (Govt. Exs. Nos. 2, 11, 12, 13; R. 174–175). In the period from November 24, 1937, to January 27, 1940, approximately two years and

two months, petitioner shipped Dr. Tate a total of 79,000 one-half grain tablets, the shipments from June 1939 to January 1940 being at the rate of 5,000 or 6,000 tablets a month (see tabulation in Govt. Ex. No. 12; also Govt. Exs. Nos. 2, 13).[12] Some of these orders were spaced as little as two or three days apart (*ibid.*) and at least once two shipments to Dr. Tate arrived at his post office on the same day (R. 176). Dr. Tate, it was conceded by petitioner's president, George Dotterweich, was one of petitioner's best customers (R. 218), and petitioner's sales to him were, during the whole of the period involved, reflected in monthly reports to the Collector of Internal Revenue in Buffalo which were executed by an officer of the company (R. 187, 188), and after July 1937 also on weekly reports showing the sales of 500 grains or more (R. 189–190).

On one occasion, June 28, 1939, Dr. Tate ordered 100 one-fourth grain and 1,000 one-half grain tablets, and petitioner shipped him the 1,000 one-half grain tablets, writing him on June 30, 1939, that "The maximum quantity any manufacturer can supply on an order is 500 grains Morphine Sulphate, and in view of this we are filling this form for only 1,000 Morphine Sulphate, ½ grain, and omitting the 100 Morphine Sulphate, ¼ grain. Please re-order this on a new Narcotic Order blank

[12] Many of these shipments were charged in the indictment as overt acts Nos. 2–24, inclusive (R. 4–6).

when your present supply is exhausted" (Govt. Ex. No. 4; R. 89-90). Attached to the letter was a sticker in red print stating that due to war condition "Primary markets are uncertain and higher" and "For immediate acceptance to our regular customers, we suggest anticipating your needs at these current discounts without delay," quoting a fifty percent discount on orders of $5 or more, with an extra ten percent on orders of $25 or more, and twenty-five percent on orders of less than $5 (Govt. Ex. No. 4). Three days later, on July 3, 1939, Dr. Tate ordered 1,000 one-half grain tablets and petitioner honored the order. In addition, the company executed five other orders from Dr. Tate during the remainder of July, making a total of 6,000 one-half grain tablets which it shipped to him for the month, more than he had previously received in any one month, and it continued to accept orders thereafter totaling 5,000 or 6,000 one-half grain tablets a month until February 1940 (Govt. Exs. Nos. 2, 12, 13). Petitioner's president, George Dotterweich, did not attempt to excuse these transactions but testified that his company was complying with the letter of the Narcotic Bureau's request for a limitation of shipments to physicians (R. 210); he felt that his company had no obligation to prevent misuse of its products or other violation of the law (R. 216).

Late in 1939 and early in 1940 the Narcotic Bureau corresponded with petitioner requesting it to list its narcotics without a 50 percent and additional 10 percent discount. On February 3, 1940, the Commissioner wrote a letter directed to George Dotterweich, as petitioner's president, stating "The inclusion of Narcotic items within the 50 percent discount provision is still objectionable notwithstanding their exclusion from the additional 10 percent discount and notwithstanding any increase in the listing price. This office is not endeavoring to make narcotics cost the consumer any certain fixed amount but is endeavoring to eliminate from catalogs, circulars and general sales policies all special inducements to buy narcotics, even though such offers may also apply to other items. The obvious intent of a 50 percent discount offer is to stimulate purchases of the items to which it applies, and this, so far as it relates to narcotics, is an objectionable practice" (Def. Ex. No. 18; R. 209). Petitioner, the testimony of its president seems to indicate, did not comply with the Bureau's request to eliminate the 50 percent discount until "in late 1940" (R. 201). At this time petitioner included the discounts in the net price, took narcotics out of the general listing in the catalogue and listed them on a separate pink (or sometimes blue) slip. This slip was not submitted to the Commissioner of Narcotics and was so inserted in the catalogue that it would be apt to fall out when the catalogue was opened by

the recipient. The quotations of 1,000 and 500 tablet lots were printed in conspicuous columns whereas in small type purchasers were advised that they could get 100 tablets at a proportionate price of one-tenth of a thousand, plus ten cents (Govt. Exs. Nos. 7, 8; R. 201, 214–215; see also R. 243, 267–268).[13]

In the meantime, Dr. Tate, after ordering 1,000 one-half grain tablets of morphine sulphate from petitioner on May 24, 1940, refused a shipment at the local post office (Govt. Ex. No. 11; R. 99–

---

[13] If the catalogue was not revised until in "late 1940", as petitioner's president seems to indicate in his testimony, the courts below, of course, were in error in referring to the pink or blue slip as having been in use throughout the period covered by the indictment (R. 243, 267–268). It should be pointed out, however, that Govt. Exs. 7 and 8, which are copies of petitioner's catalogues and contain the pink slips, are undated. Except for the testimony of petitioner's president, the evidence does not show when narcotics were first listed in this manner. In any event it is obvious that the jury could not have been misled as to the date of the adoption of the practice since they heard the testimony of petitioner's president and the trial court's charge made no reference to the practice. Additionally, the indictment, showing the period of the alleged conspiracy, was given to the jury and they were advised that "The indictment is the chart for you to go by." (R. 233; see also R. 227). If the practice in question was not adopted until after the expiration of the conspiracy charged, it even more reveals a studied design on the part of petitioner to appeal to the cupidity of those weak-willed physicians who, willing to hazard violation of the narcotic law, were on the lookout for the most economical source of supply, and hence is strongly corroborative of the evidence against petitioner for the period covered by the indictment.

102) and was indicted for and pleaded guilty to making four illegal sales of narcotics.[14]

There was also testimony that on a single order form, in 1936, petitioner ordered 5,000 ounces of morphine or 4,375,000 one-half grains (R. 193) at a saving of seventy-five cents an ounce, the morphine to be withdrawn as needed (R. 128, 206–207, 212),[15] and that in 1934 and 1935 petitioner used 4,900 ounces or 4,287,500 one-half grains of morphine (R. 213).[16]

Petitioner's president, George Dotterweich, admitted on cross-examination that he was aware that the only way a doctor could lawfully dispose of morphine was by personal administration, since he is not permitted to sell it or give it away and that he knew that "doctors, who have been convicted of the improper use of drugs, have been convicted because of the fact that they were not using it in good faith." (R. 216, 217.) He also conceded that his company had been thrice convicted of violations of the Federal Pure Food and Drug Act but claimed that the charges were technical and stated, "Three in thirty years is not

---

[14] See footnote 3, *supra*, p. 3.

[15] The petitioner's president, George Dotterweich, testified that the company's need was 200 or 300 ounces a month (R. 207).

[16] Petitioner's president explained that "Some is used in liquids and in other preparations; probably in fifty or sixty different ways (R. 213)."

so bad, according to the way I look at it" (R. 221).

In defense, petitioner's emphasis, as revealed by the cross-examination of the prosecution's witnesses and its own affirmative testimony, was on the facts that the evidence showed that there had not been any personal contact between any one associated with it and Dr. Tate; that Dr. Tate had never in any way advised it that he was selling to persons not registered; that it had never received any money from Dr. Tate other than that paid for the narcotics which he purchased (R. 108–111; 204–205); that, at some expense, it had fully cooperated with the Narcotic Bureau by complying with the various requests of that Bureau's officers and agents (R. 130–131, 138–140, 188, 195–196, 198–201, 205, 215, 220); that it accepted the rulings of the Commissioner and his subordinates "as law"; that it was under no duty to police its customers (R. 208, 216); that monthly or oftener the Government had been advised by petitioner's reports of its sales to Dr. Tate and others and that this had been supplemented by Agent Bransky's examination, while at the company's plant in 1936, of current and prior orders, and that its books and files had also been open to inspection by the Government but that no complaint had ever been made as to its business with Dr. Tate (R. 132–133, 135–138, 187, 189–192, 194, 205–206, 207). Bransky explained, however, that it was not his function to dictate

what orders petitioner should or should not fill; that he merely wanted to see what quantities were being purchased by the various registrants, although he would, of course, have called attention to noncompliance with the law (R. 136–137); that he went into petitioner's plant only for the purpose of "attempting to accomplish the type of set-up resulting in close cooperation between the Direct Sales Company and the Government relative to the carrying out of the provisions of the Harrison Narcotic Act" by giving that company the benefit of his experience "as to what they should fill, what they should not fill and curtailment, etc." (R. 151–152).

Petitioner made a motion for a directed verdict at the conclusion of all the evidence (R. 223–224), which was a renewal of a motion made at the close of the Government's case (R. 183–184). The motion was overruled (R. 223–234), and the case was submitted to the jury as to Dr. Tate and petitioner, the only two defendants then remaining on trial (R. 226). The jury found both defendants guilty (R. 10, 239). After overruling motions for a new trial and in arrest of judgment (R. 240–241) in a comprehensive opinion (R. 242–252),[11] the court sentenced petitioner

[11] This opinion, rendered after mature consideration and after the trial judge had had an opportunity to examine the pertinent authorities, does not express the doubt as to the sufficiency of the evidence which he manifested in overruling the motion for a directed verdict (R. 223–224).

to a fine of $1,000 (R. 253–254). On appeal by petitioner alone this conviction was unanimously affirmed by the Circuit Court of Appeals for the Fourth Circuit (R. 266–270).

SUMMARY OF ARGUMENT

I

United States v. *Falcone*, 311 U. S. 205, is not controlling in this case. In the *Falcone* case the Government attempted, under the aiding and abetting statute, to connect suppliers to distillers of sugar, yeast, and cans to an established conspiracy between the distillers. The evidence failed to show that the respondents knew of the distillers' conspiracy. The instant case, however, was tried and submitted to the jury on the theory that petitioner could be convicted only if it were found that it, the supplier of narcotics, and Dr. Tate, the purchaser, conspired initially to subvert the order form provisions of the narcotic law.

Under established principles of the law of conspiracy, the evidence, with the inferences which may reasonably be drawn therefrom, was sufficient to make out a case for the jury. The evidence of diversion to unlawful uses by Dr. Tate of narcotics obtained from petitioner on order forms makes it manifest that it was his design to subvert the order form provisions of the narcotic law. If there was evidence that petitioner shared this design it cannot be doubted that the

common design was carried out through concerted action. That petitioner shared Dr. Tate's evil design is shown by evidence which establishes that petitioner supplied Dr. Tate, a small town physician, with morphine sulphate tablets of a strength and in quantities and with a frequency and under circumstances which leave no doubt that Dr. Tate was misusing the narcotics. Additionally, with such knowledge, it adroitly and cleverly stimulated and encouraged Dr. Tate to continue purchases from it on order forms.

The case is not one of mere passive indifference or acquiescence to crime; the evidence shows purposive, affirmative cooperation by petitioner with Dr. Tate in carrying out his unlawful venture.

Recurring sales at frequent intervals of large quantities of narcotics to a physician rightfully may have a significance, as has been judicially recognized, which does not attach to similar transactions in such normal articles of commerce as sugar, yeast and cans, with their numerous legitimate uses. Sales of this character are a factor which, at least, may be considered by a jury, along with any other pertinent evidence, in determining whether concert exists between the supplier and the physician.

If it be necessary, as was held by the Circuit Court of Appeals for the Second Circuit in the *Falcone* case, that a party to be convicted as a conspirator must have a "stake in the venture,"

petitioner clearly had such a stake in Dr. Tate's venture. It depended for the financial success of its narcotic drug department upon volume of purchases, and it knew that the average physician such as Dr. Tate could be a "volume" purchaser only if he transgressed the narcotic law.

The Harrison Act and pertinent decisions make it manifest that petitioner is not absolved from guilt by its formalistic compliance with the order form provisions of the statute and its formalistic adherence to the various suggestions or requests of the Narcotic Bureau and its officers in relation to its dealings in narcotics. The evidence in the instant case abundantly evinces that lack of good faith on petitioner's part which a mere formalistic cooperation cannot obscure.

II

The trial judge's instructions, when considered as a whole, are not subject to the construction that the jury had to convict petitioner if they convicted Dr. Tate.

ARGUMENT

I

THERE WAS SUFFICIENT EVIDENCE TO WARRANT THE JURY IN FINDING THAT PETITIONER AND DR. TATE WERE GUILTY OF CONSPIRACY

Although petitioner relies, to a considerable extent, upon the decision of this Court in *United*

States v. *Falcone*, 311 U. S. 205, that decision involved a wholly different problem. There a conspiracy to engage in illicit distilling had been established as to a number of defendants. The respondents sold sugar, cans, and yeast either directly to distillers or to others who resold to distillers under circumstances which showed knowledge only that the materials sold would be used in the distillation of illicit spirits. The Government tried to connect the respondents with the conspiracy between the distillers on the basis of the aiding and abetting statute. The Court held, however, that the evidence did not establish that the respondents knew of the distillers' conspiracy (pp. 208, 210) [18] and that "one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of the conspiracy to which the distiller was a party but of which the supplier had no knowledge" (p. 211).

In the *Falcone* case the Government did not attempt to link the supplier and distiller in a conspiracy *inter sese*. In its opinion the Court said (pp. 207–208):

---

[18] It said, *inter alia* (p. 210) "The evidence respecting the volume of sales to any known to be distillers is too vague and inconclusive to support a jury finding that respondents knew of a conspiracy from the size of the purchases even though we were to assume what we do not decide that the knowledge would make them conspirators or aiders or abettors of the conspiracy".

> The Government does not argue * * * that conviction of conspiracy can rest on proof alone of knowingly supplying an illicit distiller, who is not conspiring with others. In such a case, as the Government concedes, the act of supplying or some other proof must import an agreement or concert of action between buyer and seller, which admittedly is not present here.

In the instant case we have, we think, the type problem which was not before this Court in the *Falcone* case.

The case as to petitioner was tried and submitted to the jury on the theory that petitioner could be convicted only if it were found that petitioner and Dr. Tate had conspired together to subvert the order form provisions of the narcotic law (R. 231). Petitioner's guilt was not made to depend at all upon any guilt of Dr. Tate growing out of his relationship to defendants other than petitioner or upon whether these other defendants were linked with the Tate-Direct Sales conspiracy.[10]

---

[10] After reading the indictment, expounding the law of conspiracy, and reading and explaining the order form provisions of the Narcotic Act, the court charged as follows:

> * * * I charge you * * * that under the offense charged in this case, you cannot find the Direct Sales Company guilty and Dr. Tate not guilty. You can find Dr. Tate guilty and the others named in the indictment guilty, but you cannot find the Direct Sales

The general principles of conspiracy law which control this case are well established. A con-

---

Company guilty unless you also find Dr. Tate guilty. * * * [R. 228.]

* * * Now, as to this case. If a physician makes an order on an order form supplied by the Department, and in bad faith, and the wholesale druggist acts in collusion with him to violate the law, they may well be guilty of conspiracy, but before you could convict the wholesale druggist of conspiracy, you would have to find that he acted in collusion with the doctor as a result of a corrupt agreement or corrupt combination. Mere carelessness on the part of the wholesale druggist or lack of investigation on its part would not be sufficient. It must have sold the drugs knowing it was selling to the doctor at the time and that the purpose of the ordering of the morphine was to satisfy the craving of addicts or for him to sell unlawfully to other people and not in the course of his legitimate practice. * * * You must find beyond a reasonable doubt that the defendants had guilty knowledge of the conspiracy and were acting in concert together before you could convict. The joinder of the minds of the defendants—that is, that they conspired together and entered into a corrupt agreement—is something which the Government must prove beyond a reasonable doubt, for it is of the essence of the crime charged; without it there can be no criminal conspiracy, and the defendants could not be convicted under this indictment. * * * I charge you that in this case there could be no verdict against the defendants unless you found beyond a reasonable doubt that the defendants had a corrupt agreement between them and had guilty knowledge as alleged in the indictment. * * * [R. 231.] * * * you have to convict both; you cannot convict one; you must convict two or none * * *. [R. 232.]

A portion of this charge was repeated by the court when, in the consideration of oral requests for instructions by petitioner, the following colloquy occurred (R. 237–238):

Mr. MAHONEY. In view of the charge that the jury cannot convict one but must convict two, I ask your Honor to charge that this jury could convict Dr. Tate and the other defendants and find the defendant, Direct Sales Company, not guilty.

spiracy under federal law has been defined by this Court as an agreement to commit an offense

---

> The COURT. I did practically charge that before, but I will charge it again. Gentlemen of the Jury, the form of your verdict will be: We, the jury, find the defendants, naming them, guilty; or, we, the jury, find the defendants, naming them, not guilty. As I charged you, you cannot find the Direct Sales Company guilty unless you find Dr. Tate guilty. You can find Dr. Tate and the other defendants guilty. There are no other defendants on trial.
>
> Mr. MAHONEY. Foster is removed.
>
> The COURT. You can find Dr. Tate guilty of having conspired, as alleged in the indictment, and you can find the defendant, Direct Sales Company, not guilty.

In its remarks in overruling the motion for a directed verdict (R. 224) and in its opinion denying the motions for a new trial and in arrest of judgment, the trial court makes it manifest that the real issue before the jury was whether petitioner and Dr. Tate agreed to violate the order form provisions of the narcotics statute. In that opinion the court said, at R. 252, "The trial of this case in reality finally resolved itself into the question of whether or not Direct Sales Company and Dr. Tate agreed to violate this provision [*i. e.*, the provision of Section 2 making it unlawful for any person to obtain by means of an order form narcotic drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of lawful business in the drugs or in the legitimate practice of his profession]." It said in addition (R. 252):

> * * * Let it be assumed that the other defendants could have successfully maintained that they did not know of this conspiracy between Dr. Tate and the Direct Sales Company. They did not raise the point but plead guilty generally to the indictment. * * * The jury would have been justified in finding that Dr. Tate and Direct Sales Company agreed to violate the quoted portion of Section 2 and that the other defendants knew of such conspiracy and joined it, for the defendant Johnson testified that one of the purchases he made from Dr. Tate was in a bottle of the Direct Sales Company. Likewise the jury would have been justified in finding Dr. Tate and Direct Sales Company guilty of an agreement to violate the above quoted portion of

against the Government, the collective planning of criminal conduct, the confederating or com-

---

> Section 2 of the Act and not been concerned at all about the defendants who plead guilty, whether they knew of the conspiracy or not. * * *

And the opinion of the circuit court of appeals makes it abundantly clear that that court affirmed petitioner's conviction on the ground that the evidence established an unlawful agreement or conspiracy between petitioner and Dr. Tate (R. 268).

It is true that sandwiched in amongst various requested charges given evidently at the instance of petitioner is an instruction which reads (R. 234):

> * * * "If an illegal combination or agreement was formed by the doctor and others, the mere fact that the defendant supplied morphine sulphate pursuant to proper order blank is not sufficient. The defendant must have had knowledge of such conspiracy," or there must have been a common design and purpose and guilty cooperation. I added that to it. "Before convicting, the jury must find that the defendant knew of the existence of a conspiracy and with knowledge thereof joined in the same." I charge you that. * * *

Read in its context, it is quite evident that the purpose of this instruction was to caution the jury that petitioner was not accountable for any conspiracy existing between Dr. Tate and his customers unless petitioner knew of the existence of such conspiracy. The effect of this instruction was to remove the case from the periphery of this Court's decision in the *Falcone* case and to focus the jury's attention on the fact that petitioner could not be found guilty unless it had conspired with Dr. Tate. This effect is reinforced by the repeated objections by petitioner to evidence which did not directly concern both it and Dr. Tate (see R. 39, 43, 44, 51, 52–53, 60–61, 63, 65, 79, 80; cf. R. 82).

In any event the instruction as modified by the court cannot be said to be an invalid one since it meets the *Falcone* decision *eis-a-eis*. In consequence, we do not have the situa-

bining for criminal purposes, when attended by an act of one or more of the conspirators to effect the object of the conspiracy.[20] A conspiracy

---

tion where a reversal would be required because it is not known upon which of two theories a jury's verdict may be predicated, one of them being untenable (see *Pierce* v. *United States*, 314 U. S. 306, 310; *Williams* v. *North Carolina*, No. 29, present Term, decided by this Court December 21, 1942; *Viereck* v. *United States*, No. 458, present Term, decided by this Court March 1, 1943), since it is perfectly manifest that, under the instructions and upon the theory upon which the case was tried, the jury's verdict must have been based upon the ground that Dr. Tate and petitioner had conspired together.

It was entirely unnecessary for the Government to link the other defendants with the conspiracy between Dr. Tate and petitioner, or to connect petitioner with another conspiracy between Dr. Tate and the other defendants so long as it established an unlawful agreement between Dr. Tate and petitioner. Variance, if any, between the indictment and proof in these respects, or with relation to the establishment of all the objects of the conspiracy, is immaterial, especially since petitioner at no time during the trial or since has claimed that any prejudice resulted. *Berger* v. *United States*, 295 U. S. 78, 81–83; *Kopald-Quinn & Co.* v. *United States*, 101 F. (2d) 628, 633 (C. C. A. 5), certiorari denied, *sub nom. Riesbaum* v. *United States*, 307 U. S. 628; *Martin* v. *United States*, 100 F. (2d) 490, 495 (C. C. A. 10), certiorari denied, 306 U. S. 649; *Beland* v. *United States*, 100 F. (2d) 289, 290–291 (C. C. A. 5), certiorari denied, 306 U. S. 636; *Marino* v. *United States*, 91 F. (2d) 691, 698–699 (C. C. A. 9), certiorari denied, *sub nom. Gullo* v. *United States*, 302 U. S. 764; *Schefano* v. *United States*, 84 F. (2d) 513, 515 (C. C. A. 5); *Breese* v. *United States*, 203 Fed. 824, 831 (C. C. A. 4); cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 246–247.

[20] *Braverman* v. *United States*, 317 U. S. 49, 53; *United States* v. *Falcone*, 311 U. S. 205, 210; *Gebardi* v. *United States*, 287 U. S. 112, 121; *Wong Tai* v. *United States*, 273 U. S. 77,

may have as its object the bringing about of a continuing result, as here, rather than the doing of a single misdeed; nevertheless, it remains but a single conspiracy.[21] The gist of the offense is the unlawful agreement; "The conspiracy is the crime." *Frohwerk* v. *United States,* 249 U. S. 204, 210; *United States* v. *Rabinowich,* 238 U. S. 78, 85–86; *Braverman* v. *United States,* 317 U. S. 49, 53. Direct evidence of the unlawful agreement is rarely available, since generally a conspiracy is hatched in secret. *United States* v. *Rabinowich, supra,* at p. 88. Often times it may be proved only by collocation of apparently disconnected circumstances (*United States* v. *Manton,* 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664) or by what the conspirators have done (*Hogan* v. *O'Neill,* 255 U. S. 52, 55; *United States* v. *Harrison,* 121 F. (2d) 930, 934 (C. C. A. 3), certiorari denied, 314 U. S. 661; *Marino* v. *United States,* 91 F. (2d) 691, 698 (C.

81; *Frohwerk* v. *United States,* 249 U. S. 204, 210; *Williamson* v. *United States,* 207 U. S. 425, 447; *Hyde* v. *Shine,* 199 U. S. 62, 76; *Bannon and Mulkey* v. *United States,* 156 U. S. 464, 468; *Dealy* v. *United States,* 152 U. S. 539, 547; *Pettibone* v. *United States,* 148 U. S. 197, 202; *United States* v. *Britton,* 108 U. S. 199, 204; *United States* v. *Hirach,* 100 U. S. 33, 34.

[21] *Braverman* v. *United States,* 317 U. S. 49, 54; *United States* v. *Kissel,* 218 U. S. 601, 607; *Hyde* v. *United States,* 225 U. S. 347, 369; *Brown* v. *Elliott,* 225 U. S. 392, 400; *Ford* v. *United States,* 273 U. S. 593, 602. See also *United States* v. *Borden Co.,* 308 U. S. 188, 202; *Interstate Circuit* v. *United States,* 306 U. S. 208, 227; *In re Snow,* 120 U. S. 274, 281, 286; *United States* v. *Manton,* 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664.

C. A. 9), certiorari denied, *sub nom. Gullo* v. *United States*, 302 U. S. 764; *Zito* v. *United States*, 64 F. (2d) 772, 775 (C. C. A. 7)). There is no necessity even that the conspirators should meet together or be personally acquainted [22] or that each know precisely how the illegal object is to be accomplished.[23] It is sufficient to support a conviction for conspiracy that the evidence establish that there is a concurrence of intention or design to commit a criminal offense by concerted action.[24]

---

[22] *Braverman* v. *United States*, 125 F. (2d) 283, 285 (C. C. A. 6), reversed on other grounds, 317 U. S. 49; *United States* v. *Feinberg*, 123 F. (2d) 425, 427 (C. C. A. 7), certiorari denied, 315 U. S. 801; *Eley* v. *United States*, 117 F. (2d) 526, 528 (C. C. A. 6); *Jezewski* v. *United States*, 13 F. (2d) 599, 602 (C. C. A. 6), certiorari denied, 273 U. S. 735; cf. *United States* v. *Masonite Corp.*, 316 U. S. 265, 275–276.

[23] *Pierce* v. *United States*, 252 U. S. 239, 244; *Frohwerk* v. *United States*, 249 U. S. 204, 209; *Williamson* v. *United States*, 207 U. S. 425, 449; *Marino* v. *United States*, 91 F. (2d) 691, 696 (C. C. A. 9), certiorari denied, *sub nom. Gullo* v. *United States*, 302 U. S. 764; *Craig* v. *United States*, 81 F. (2d) 816, 822 (C. C. A. 9), certiorari denied, 298 U. S. 690; *Middleton* v. *United States*, 49 F. (2d) 538, 539 (C. C. A. 8); *Jezewski* v. *United States*, 13 F. (2d) 599, 602 (C. C. A. 6), certiorari denied, 273 U. S. 735.

[24] *United States* v. *Patten*, 226 U. S. 525, 543; *Abrams* v. *United States* 250 U. S. 616, 621; *Pierce* v. *United States*, 252 U. S. 239, 244; *Morrison* v. *California*, 291 U. S. 82, 93; *United States* v. *Masonite Corp.*, 316 U. S. 265, 275. See also, *Allen* v. *United States*, 4 F. (2d) 688, 692 (C. C. A. 7), certiorari denied, *sub nom. Hunter* v. *United States*, 267 U. S. 597; *Jezewski* v. *United States*, 13 F. (2d) 599, 602 (C. C. A. 6), certiorari denied, 273 U. S. 735; *Zottarelli* v. *United States*, 20 F. (2d) 795, 798 (C. C. A. 6), certiorari denied, 275 U. S. 571; *Wyatt* v. *United States*, 23 F. (2d) 791, 792 (C. C. A. 3),

Viewing the evidence, with the inferences which may reasonably be drawn therefrom, in the light most favorable to the Government (as we must, *Glasser* v. *United States*, 315 U. S. 60, 80), the case resolves itself, in summary, into this:

The diversion from legitimate practice to the satisfaction of addiction and for resale by Dr. Tate in 1939 of narcotics purchased by him from petitioner on order forms is abundantly established by direct evidence, and it is a necessary inference from the size of the doctor's community and the quantity and frequency of his purchases from petitioner at other times that he was engaged in similar practices during at least a considerable portion of the period covered by the indictment. It is therefore evident that it was the design of Dr. Tate in obtaining narcotics from petitioner to subvert the order form provisions of the narcotics laws.

If there was adequate evidence to establish that petitioner shared Dr. Tate's evil design, this was sufficient to warrant its conviction, for there

---

certiorari denied, 277 U. S. 588; *Booth* v. *United States*, 57 F. (2d) 192, 197 (C. C. A. 10); *Lefco* v. *United States*, 74 F. (2d) 66, 68–69 (C. C. A. 3); *Laska* v. *United States*, 82 F. (2d) 672, 674 (C. C. A. 10), certiorari denied, 298 U. S. 689; *Short* v. *United States*, 91 F. (2d) 614, 618 (C. C. A. 4); *Wilder* v. *United States*, 100 F. (2d) 177, 182 (C. C. A. 10); *Beland* v. *United States*, 100 F. (2d) 289 (C. C. A. 5), certiorari denied, 306 U. S. 636; *United States* v. *Anderson*, 101 F. (2d) 325, 330 (C. C. A. 7), certiorari denied, 307 U. S. 625; *Oliver* v. *United States*, 121 F. (2d) 245, 249 (C. C. A. 10), certiorari denied, 314 U. S. 666; 89 U. of Pa. L. Rev. 624, 632; 48 Yale Law Journal 1447, 1448.

can be no doubt that the common design was carried out through concerted action. Petitioner was the supplier through whom, by order forms, Dr. Tate constantly secured the morphine with which to engage in his illicit practice. That the jury was entitled to believe from the evidence as a reasonable inference that petitioner was a party to Dr. Tate's evil design is shown by the following facts:

Petitioner had been a supplier of narcotics to physicians for a number of years. It was one of the largest houses of its kind in the country. It knew that under the law doctors were required to dispose of morphine by personal administration and were not entitled to sell it, and that the highest good faith was required of the doctor who obtained narcotics pursuant to an official form. It also knew that Dr. Tate was a small town physician, as were most of the doctors who ordered from it. In 1936 a narcotics agent advised petitioner that it was being used as a source of supply by doctors who had been convicted of flagrant violations of the narcotic law, submitting to petitioner a list which showed that 55 of the 204 doctors who had been so convicted, or over 26 percent, were petitioner's customers.[28]

[28] It is interesting to note that at or about this time (1936) there were some 1,350 wholesale dealers in the United States from whom doctors might order narcotics (see p. 41 of *Traffic in Opium and Other Dangerous Drugs for the Year Ended December 31, 1941*, published by the United States Treasury Department, Bureau of Narcotics, Washington, D. C., pursuant to the requirements of the Act of June 14, 1930).

This same agent, one of long experience, also advised petitioner, in a spirit of cooperation, that it had been his experience that the average physician throughout the country would order no more than 200 to 400 one-quarter grain tablets in an entire year. If it had not been aware before, it certainly was then put on notice, that Dr. Tate could not possibly use legitimately the thousands of one-half grain tablets of morphine sulphate which it was shipping to him periodically.[26] Yet, although from that moment on petitioner paid lip service to its avowals of cooperation with the Narcotic Bureau in that bureau's effort to curb the diversion of narcotic drugs into illicit channels, its sabotaging of that program was as effective as could be imagined. While, as requested, it eliminated the listing of tablets in lots of 5,000, it continued to offer the listings of 1,000 and 500 tablets at discounts which made the price most attractive, as compared with that of other drug houses, to any who, like Dr. Tate, were seeking the most economical source of supply in order to derive the greatest profit from their illicit traffic. And although, in ostensible conformity with its understanding with the Narcotic Bureau, it honored no order from Dr. Tate for

[26] Petitioner could not have been oblivious to the fact that Dr. Tate ordered no codein. There is virtually no codein addiction in this country (p. 23, *Traffic in Opium and Other Dangerous Drugs for the Year Ended December 31, 1939*, published by Bureau of Narcotics, Treasury Department; p. 14, *ibid.* 1940).

more than 1,000 tablets, it continued to fill his orders for that amount at one-half grain strength, a dosage which it had been advised was rarely used by physicians, and at a frequency which removes from the field of conjecture the conclusion that it must have known that Dr. Tate was using the drugs for illegitimate purposes. Thus, in the period of slightly over two years between November 24, 1937, and January 27, 1940, it shipped Dr. Tate 79,000 one-half grain tablets and in the last six months of 1939 its shipments reached the enormous quantities of 5,000 and 6,000 one-half grain tablets a month, enough, said the courts below (R. 247, 268), to have permitted Dr. Tate to give 400 doses every day to his patients. Aside from the fact that such enormous shipments to a doctor who proved to be one of petitioner's best customers could hardly have escaped the attention of those responsible for petitioner's management, its sales to Dr. Tate were reflected periodically in its monthly and weekly official reports. But the connivance of petitioner in Dr. Tate's unlawful enterprise reached its apex when in June 1939, during the indictment period, it refused to honor an excess over Dr. Tate's usual 1,000 one-half grain tablet order of 100 one-quarter grain tablets and advised Dr. Tate to reorder the 100 tablets on a separate order form but, at the same time, suggested by a sticker in red print attached to its letter that Dr. Tate should anticipate his future

needs and take advantage of the discounts offered. Clearly, although it did not in terms expressly say so, petitioner's communication could have left no doubt in the doctor's mind that more orders were solicited so long as a single order did not exceed 1,000 tablets. That Dr. Tate did not lose the full significance of petitioner's invitation is evident from the fact that only three days later he placed an order for 1,000 one-half grain tablets, which was honored, as were similar later orders which ultimately reached the preposterous total of 5,000 or 6,000 one-half grain tablets a month. The lack of good faith of petitioner in dealing with its narcotics trade is also illustrated by its shenanigan, apparently "in late 1940," of eliminating, in apparent cooperation with the Narcotic Bureau, its 50 and additional 10 per cent discounts but at the same time quoting the same price as a net price and inviting attention to the attractiveness of its prices through a colored slip inserted in its catalogue in such manner that it would easily dislodge itself and thus obtain the desired scrutiny.[37]

---

[37] At the trial Dr. Tate, on cross-examination, when asked "Did they [petitioner] have any knowledge whatsoever, as you testified yesterday, that you were selling to people not registered," he replied, "No, I don't suppose they did" (R. 109). However, in the face of the testimony to which reference has been made, reliance can not be placed, to destroy the concurrence of evil intention, on Dr. Tate's claimed supposition as to the state of petitioner's mind, since, as this Court has held, in conspiracy, as in other crimes, "Men must be held to have intended, and to be accountable for, the effects

It must be evident that this case is not one where a conspiracy is attempted to be spelled out because of mere passive acquiescence or indifference to crime. See, *e. g.*, *Di Bonaventura* v. *United States*, 15 F. (2d) 494 (C. C. A. 4).[28] Petitioner sold to Dr. Tate under circumstances which leave no room for doubt that it knew that he was misusing the narcotics and, additionally, with such knowledge, it adroitly and cleverly continually stimulated and encouraged him to continue in his unlawful venture. Its action was purposive, affirmative, and cooperative.[29]

It is recognized, of course, that one or two isolated transactions of sale of narcotics, even in large quantities, while perhaps creating suspicion, might not justify conviction for conspiracy, but sales in the quantities and with the frequency and under the circumstances disclosed by the evidence in this case allow no leeway for speculation or conjecture as to whether the supplier joined with the vendee in his unlawful conduct. As showing guilty

---

which their acts were likely to produce." *Abrams* v. *United States*, 250 U. S. 616, 621. See also *United States* v. *Patten*, 226 U. S. 525, 543; *United States* v. *Masonite Corp.*, 316 U. S. 265, 275.

[28] See also, *United States* v. *Dellaro*, 99 F. (2d) 781 (C. C. A. 2).

[29] *United States* v. *Cusimano*, 123 F. (2d) 311, 613 (C. C. A. 7); *United States* v. *Harrison*, 121 F. (2d) 930, 933, 934 (C. C. A. 3), certiorari denied, 314 U. S. 661; *United States* v. *Pecoraro*, 113 F. (2d) 245, 246 (C. C. A. 2), certiorari denied, 312 U. S. 685; *United States* v. *Pandolfi*, 110 F. (2d) 736, 737 (C. C. A. 2), certiorari denied, 310 U. S. 651; *Zito* v. *United States*, 64 F. (2d) 772, 775 (C. C. A. 7).

knowledge and design, recurring sales at frequent intervals of large quantities of narcotics to a physician rightfully may have a significance[30] which does not necessarily attend upon similar transactions in commodities such as sugar, yeast and cans. Such commodities are normal articles of commerce and have, of course, numerous legitimate uses; illegitimate utilization is relatively infrequent. Narcotic drugs have a comparatively limited field in the legitimate practice of medicine,[31] and their deleterious nature, when misused, has been recognized by this Court.[32] Elaborate safeguards have been embodied in the federal narcotic laws in the effort to curb, so far as possible, their diversion into illegal channels and their resulting misuse. Certainly, quantity and frequency of sales is a factor which at least may be considered by a jury, along with any other pertinent evidence, in determining whether collusion exists with the phy-

---

[30] Cf. *Webb* v. *United States*, 249 U. S. 96; *Jin Fuey Moy* v. *United States*, 254 U. S. 189, 193, 194; *United States* v. *Behrman*, 258 U. S. 280, 288–289; *Linder* v. *United States*, 268 U. S. 5, 20, 22; *Ratigan* v. *United States*, 88 F. (2d) 919, 923, certiorari denied, 301 U. S. 705; *Friedman* v. *United States*, 260 Fed. 388, 391, 392 (C. C. A. 6), certiorari denied, 250 U. S. 671.

[31] A doctor of long experience testified at petitioner's trial that "The purpose of morphine is to ease pain and act as a sedative to inflamed mucous membrane as in the respiratory tract and such as that" (R. 163) and that even for this purpose codein, which is "very much milder in effect," can be used as a substitute (R. 164).

[32] *Casey* v. *United States*, 276 U. S. 413, 418; *Yee Hem* v. *United States*, 268 U. S. 178, 184.

sician. *Friedman* v. *United States*, 260 Fed. 388, 391–392 (C. C. A. 6), certiorari denied, 250 U. S. 671. Petitioner, a dealer in narcotics of consequence and of long standing, can hardly place upon itself the mantle of an indifferent seller of a normal article of commerce; it is clear on the contrary that petitioner cleverly and adroitly solicited unlawful narcotic trade.[35]

If, as was held by the Circuit Court of Appeals for the Second Circuit in the *Falcone* case (109 F. (2d) 579, 581), a party to be convicted as a conspirator must have "a stake in the venture," petitioner herein had the stake. It is true that Dr. Tate did not divide his profits with petitioner and that petitioner received no more than its sales price. Nevertheless, in any reason-

---

[35] Petitioner did in fact obtain more than a normal share of the unlawful narcotic trade indulged in by doctors, for, although there were, in 1936 and previous thereto, more than 1,350 wholesale dealers in the United States from whom doctors might order narcotics (See page 41 of *Traffic in Opium and Other Dangerous Drugs for the Year Ended December 31, 1941*, published by the United States Treasury Department, Bureau of Narcotics, Washington, D. C., pursuant to the requirements of the Act of June 14, 1930), 55 of the 214 doctors, or approximately 26 per cent, convicted in 1936 or previous thereto of violating the narcotic laws were petitioner's customers.

[1] This concept is one, however, which did not receive express approbation in this Court's decision in that case and has been frowned upon elsewhere. See *Backun* v. *United States*, 112 F. (2d) 635, 637 (C. C. A. 4); see also *United States* v. *Harrison*, 121 F. (2d) 930, 933 (C. C. A. 3), certiorari denied, 314 U. S. 661.

able sense of the term "stake" petitioner had it in Dr. Tate's venture. Its narcotic business accounted for a substantial portion of its income (15 percent), although in unit volume narcotics constituted only a small percentage of the articles which it sold (2 percent). It sold the drugs at considerably less (30 to 40 percent) than did other drug houses, several of whom were of nation-wide reputation; and it had a field for its narcotics which was comparatively limited (14,400 doctors) and which was shared by many other suppliers (1,350). Depending, therefore, as it did, upon the volume of its sales for the financial success of its narcotic drug department, it is apparent that petitioner had a real stake in its business with those physicians upon whom it could rely to furnish the necessary volume. Compare *United States* v. *Pecoraro*, 115 F. (2d) 245, 246 (C. C. A. 2), certiorari denied, 312 U. S. 685. And it knew that the average physician could be a "volume" purchaser only if he transgressed the narcotic law.

Petitioner places its greatest emphasis, it would seem, upon its formalistic compliance with the order form provisions of the statute and upon its formalistic adherence to the various suggestions or requests made by the Narcotic Bureau and its officers in relation to petitioner's dealings in narcotics. It asserts that it never sold to Dr. Tate, except upon official order forms, that the statute places no ceiling on amounts to be honored in

any orders received by a manufacturer or wholesaler, that the Government, although it had been advised of the extent of Dr. Tate's purchases by petitioner's periodic reports and by inspection of petitioner's records, had registered no objection, and that the requests and suggestions of the Commissioner of Narcotics and his assistants were interpretations of the law, upon which it was entitled to rely.[35] Petitioner's argument, of course, misconceives the nature of the Harrison Act and the functions of the narcotic officers thereunder. The Act is a revenue measure with a moral end, fortified by criminal sanctions.[36] While the act lays down certain standards of conduct noncompliance with which subjects the offender to penalties and punishment, it is in no sense a licensing statute. The Commissioner cannot take away the registrant's right to do business or to practice his profession merely because he does not like the way the registrant behaves himself. He may suggest but cannot command. He must, as is abundantly illustrated by the numerous decisions, depend upon the criminal

---

[35] It is undisputed that federal officers did not prevail upon petitioner to operate its business in the manner now condemned, but if they had, even that fact would apparently not be a defense. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225–227.

[36] *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 402; *United States* v. *Doremus*, 249 U. S. 86, 94; *United States* v. *Balint*, 258 U. S. 250, 253, 254; *Linder* v. *United States*, 268 U. S. 5, 17, 22.

courts to discourage evasion of the statute's standards. The statute itself amply discloses that mere reliance upon prescription blanks or order forms will not absolve from guilt if there is a misuse of these indicia of regularity (Appendix, pp. 47–49, 50, *infra*).[37] Absent "good faith" the prescription blank or the order form is but a scrap of paper. While, of course, the wholesaler and the retailer of narcotic drugs are not required to "police" their customers, nonaction is a far cry from cooperation with those customers to subvert the law.[38] Despite petitioner's protest that it cooperated with the Narcotic Bureau, the evidence in the instant case abundantly manifests a lack of good faith which mere formalism cannot obscure.

While the case is novel (R. 223), it is so only in the sense that this is apparently the first one in which the Government has linked a registered

---

[37] *United States* v. *Behrman*, 258 U. S. 280, 287; *Jin Fuey Moy* v. *United States*, 254 U. S. 189; *Webb* v. *United States*, 249 U. S. 96, 99–100; cf. *Linder* v. *United States*, 268 U. S. 5, 17–18; see also, *Friedman* v. *United States*, 260 Fed. 388, 390 (C. C. A. 6), certiorari denied, 250 U. S. 671; *Saunders* v. *United States*, 260 Fed. 386, 388 (C. C. A. 6).

[38] If the decisions in *Eckert* v. *United States*, 7 F. (2d) 257 (C. C. A. 8), and *United States* v. *Joseph Fleming & Son*, 251 Fed. 932 (W. D. Pa.), cited by petitioner, are sound (compare, however, the decisions of this Court in footnote 37), they at least recognize that the retail druggist may not collude with the physician to violate the law. They have no other relevance here since it is well settled that the overt acts need not themselves be criminal to support a conviction for conspiracy. *Braverman* v. *United States*, 317 U. S. 49, 53.

wholesale dealer in narcotics[38] with a practicing physician as conspirators (R. 268). But the errant doctor, as the books illustrate, has often been successfully tied up in a conspiracy with that other source of supply, the collusive druggist,[39] and there should be no reason why any different rule of criminal liability should prevail. The controlling principles of conspiracy law are the same.

II

THE TRIAL JUDGE CLEARLY DID NOT, IN HIS INSTRUCTIONS TO THE JURY, CREATE THE IMPRESSION THAT THE JURY HAD TO CONVICT PETITIONER IF THEY CONVICTED DR. TATE

Petitioner's contention that the trial judge erroneously gave the jury the impression that they had to convict petitioner if they convicted Dr. Tate is patently frivolous. While the district court did state at one point in its charge that "you have to convict both; you cannot convict one; you must convict two or none" (R. 232) and at an-

---

[38] Of course, so far as the facts of the instant case are concerned, petitioner's relationship with Dr. Tate was actually that of a retailer, unless Dr. Tate be himself considered as a retailer.

[39] Cf. *Webb* v. *United States*, 249 U. S. 96; *Heller* v. *United States*, 104 F. (2d) 446 (C. C. A. 4); *Friedman* v. *United States*, 260 Fed. 388, certiorari denied, 250 U. S. 671; see also, *Linder* v. *United States*, 268 U. S. 5, 20; *Jin Fuey Moy* v. *United States*, 254 U. S. 189.

other time "you cannot convict one without both" (R. 234), this language was clearly designed to emphasize the fact that, before the jury could convict petitioner, it was necessary for them to find a collusive agreement between petitioner and Dr. Tate and, consequently, to find Dr. Tate guilty also. This theory was explained in several places in the charge, but at the same time the court made it manifest both during its charge and during a colloquy with petitioner's counsel in connection with oral requests for instructions that Dr. Tate could be convicted alone, upon the basis of his relationship with defendants other than petitioner.[41] The court's instructions must, of course, be considered as a whole and since, so considered, the alleged objectionable language is not subject to misconstruction, the charge cannot be considered as erroneous. *United States* v. *McCann*, 32 F. (2d) 540, 542 (C. C. A. 2), certiorari denied, 280 U. S. 559; *Kaufmann* v. *United States*, 282 Fed. 776, 785 (C. C. A. 3), certiorari denied, 260 U. S. 735; *Degnan* v. *United States*, 271 Fed. 291, 293 (C. C. A. 2).

---

[41] See footnote 19, *supra*, pp. 24–26.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

CHARLES FAHY,
Solicitor General,
WENDELL BERGE,
Assistant Attorney General,
OSCAR A. PROVOST,
MELVA M. GRANEY,
W. MARVIN SMITH,
VALENTINE BROOKES,
Attorneys.

APRIL 1943.

APPENDIX

Section 37 of the Criminal Code, the general conspiracy statute, (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Sections 1 and 2 of the Harrison Narcotic Act, as amended, as reproduced in the Internal Revenue Code, provide in part:

Section 1, as amended:

> I. R. C. § 3220. *Tax.*
>
> On or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall pay the special taxes hereinafter provided. * * *
>
> * * * * *
>
> (b) *Wholesale dealers.*
>
> Wholesale dealers, lawfully entitled to sell and deal in any of the aforesaid drugs, $12 per annum;
>
> (c) *Retail dealers.*
>
> Retail dealers, lawfully entitled to sell and deal in any of the aforesaid drugs, $3 per annum;

(d) *Physicians, dentists, veterinary surgeons, and other practitioners.*

Physicians, * * * lawfully entitled to distribute, dispense, give away, or administer any of the aforesaid drugs to patients upon whom they in the course of their professional practice are in attendance, $1 per annum or fraction thereof during which they engage in any of such activities;

* * * * *

I. R. C. § 3221. *Registration*—(a) *Requirements.*

On or before July 1 of each year every person who engages in any of the activities enumerated in section 3220 shall register with the collector of the district his name or style, place of business and place or places where such business is to be carried on, and every person upon first engaging in any such activities shall immediately make like registration.

* * * * *

I. R. C. § 3224. *Unlawful acts in case of failure to register and pay special tax*—(a) *Trafficking.*

It shall be unlawful for any person required to register under the provisions of this part or section 2551 (a) to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this part, or section 2551 (a).

* * * * *

I. R. C. § 3228. *Definitions*—(a) *Person.*

The word "person" as used in this part and subchapter A of chapter 23 shall be construed to mean and include a partner-

ship, association, company, or corporation, as well as a natural person.

* * * * *

(c) *Wholesale dealer.*

Every person who sells, or offers for sale, any of said drugs in the original stamped packages as provided in section 2553 (a) shall be deemed a wholesale dealer.

(d) *Retail dealer.*

Every person who sells or dispenses from original stamped packages as provided in section 2553 (a) shall be deemed a retail dealer: * * *

I. R. C. § 2553. *Packages*—(a) *General requirement.*

It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

(b) *Exceptions in case of registered practitioners.*

The provisions of subsection (a) shall not apply—

(1) *Prescriptions.*

To any person having in his or her possession any of the drugs mentioned in section 2550 (a) which have been obtained from a registered dealer in pursuance of

a prescription, written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under section 3221; and where the bottle or other container in which such drug may be put up by the dealer upon said prescription bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person writing said prescription; or

(2) *Dispensations direct to patients.*

To the dispensing, or administration, or giving away of any of the aforesaid drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept as required by this subchapter of the drugs so dispensed, administered, distributed, or given away.

Section 2, as amended:

I. R. C. § 2554. *Order forms—(a) General requirement.*

It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a)[1] except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

* * * * *

[1] *I. e.*, "opium, coca leaves, any compound, salt, derivative, or preparation thereof."

(e) *Other exceptions.*

Nothing contained in this section, section 2563, or section 2564 shall apply—

(1) *Use of drugs in professional practice.*

To the dispensing or distribution of any of the drugs mentioned in section 2550 (a) to a patient by a physician, dentist, or veterinary surgeon registered under section 3221 in the course of his professional practice only: *Provided*, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in section 2556.

(2) *Prescriptions.*

To the sale, dispensing, or distribution of any of the drugs mentioned in section 2550 (a) by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under section 3221: *Provided, however*, That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: *And provided further*, That such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the

officers, agents, employees, and officials mentioned in section 2556.

* * * * *

(d) *Preservation.*

Every person who shall accept any order required under subsection (a), and in pursuance thereof shall sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a), shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section 2556.

(e) *Duplicates.*

Every person who shall give an order as provided in this section to any other person for any of the drugs mentioned in section 2550 (a) shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Secretary, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials mentioned in section 2556.

(f) *Supply.*

The Secretary shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors for sale by them to those persons who shall have registered and paid the special tax as required by sections 3221 and 3220 in their districts, respectively; and no collector shall sell any of such forms to any persons other than a person who has registered and paid the

special tax as required by said sections in his district. * * *

(g) *Unlawful use.*

It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession.

* * * * *

The following provisions of the Internal Revenue Code relate to the records, books, and returns required to be kept and made by registrants and authorize inspection by authorized officials of the returns, duplicate order forms and prescriptions:

I. R. C. § 2555. *Records, statements, and returns*—(a) *General Requirement.*

Every person liable to any tax imposed by this subchapter or section 3220, or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Secretary may from time to time prescribe.

(b) *Books and monthly returns of importers, manufacturers, and wholesale dealers.*

Importers, manufacturers, and wholesale dealers shall keep such books and records and render such monthly returns in relation to the transactions in the aforesaid drugs as the Secretary may by regulations require.

(c) *Returns by registrants of drugs received*—(1) *Requirement.*

Any person who shall be registered in any internal revenue district under the pro-

visions of section 3221 shall, whenever required so to do by the collector of the district, render to the said collector a true and correct statement or return, verified by affidavit, setting forth the quantity of the aforesaid drugs received by him in said internal revenue district during such period immediately preceding the demand of the collector, not exceeding three months, as the said collector may fix and determine; the names of the persons from whom the said drugs were received; the quantity in each instance received from each of such persons, and the date when received.

The penalty provisions, derived from Section 9 of the Harrison Act and from complementary statutes, read in part, as follows:

> I. R. C. § 2557. *Penalties*— * * *
> (b) *Violations in general.*
> (1) Any person who violates or fails to comply with any of the requirements of this subchapter or part V of subchapter A of chapter 27, shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court.
> (2) Any person required under this subchapter or section 3220 to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter or section 3220, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not

more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(3) Any person required under this subchapter or section 3220 of chapter 27 to collect, account for and pay over any tax imposed by this subchapter or said section 3220, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this subchapter or section 3220 or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(4) Any person who willfully fails to pay, collect, or truthfully account for and pay over, any tax imposed by this subchapter or section 3220 or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected. * * *

* * * * *

(8) The term "person" as used in paragraphs (2), (3) and (4) includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

U. S. GOVERNMENT PRINTING OFFICE 1943

SUPREME COURT OF THE UNITED STATES.

No. 593.—October Term, 1942.

Direct Sales Company, Inc., Petitioner, *vs.* United States of America. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[June 14, 1943.]

Mr. Justice Rutledge delivered the opinion of the Court.

Petitioner, a corporation, was convicted of conspiracy to violate the Harrison Narcotic Act.[1] It challenges the sufficiency of the evidence to sustain the conviction. Because of asserted conflict with *United States* v. *Falcone*, 311 U. S. 205, certiorari was granted.

Petitioner is a registered drug manufacturer and wholesaler.[2] It conducts a nationwide mail-order business from Buffalo, New York. The evidence relates chiefly to its transactions with one Dr. John V. Tate and his dealings with others. He was a registered physician, practicing in Calhoun Falls, South Carolina, a community of about 2000 persons. He dispensed illegally vast quantities of morphine sulphate purchased by mail from petitioner. The indictment charged petitioner, Dr. Tate, and three others, Black, Johnson and Foster, to and through whom Tate illegally distributed the drugs, with conspiring to violate Sections 1 and 2 of the Act,[3] over a period extending from 1933 to 1940. Foster was granted a severance, Black and Johnson pleaded guilty, and petitioner and Dr. Tate were convicted. Direct Sales alone appealed. The Circuit Court of Appeals affirmed. 131 F. 2d 835.

---

1 The conspiracy statute, R. S. § 5440, as amended, 18 U. S. C. § 88, provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

The pertinent provisions of the Harrison Act are set out in note 3, *infra*.

2 38 Stat. 785, as amended, 26 U. S. C. §§ 3220, 3221.

3 38 Stat. 785, as amended, 26 U. S. C. §§ 2553, 2554. The indictment charged the conspiracy's object was to violate those portions of the Act (as amended) which provide:

"It shall be unlawful for any person required to register under the provisions of this part or section 2551 (a) to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this part, or section 2551(a)." 26 U. S. C. § 3224.

"It shall be unlawful for any person to purchase, sell, dispense, or dis-

The parties here are at odds concerning the effect of the *Falcone* decision as applied to the facts proved in this case. The salient facts are that Direct Sales sold morphine sulphate to Dr. Tate in such quantities so frequently and over so long a period it must have known he could not dispense the amounts received in lawful practice and was therefore distributing the drug illegally. Not only so, but it actively stimulated Tate's purchases.

He was a small-town physician practicing in a rural section. All of his business with Direct Sales was done by mail. Through its catalogues petitioner first made contact with him prior to 1933. Originally he purchased a variety of pharmaceuticals. But gradually the character of his purchases narrowed, so that during the last two years of the period alleged for the conspiracy he ordered almost nothing but morphine sulphate. At all times during the period he purchased the major portion of his morphine sulphate from petitioner. The orders were made regularly on his official order forms. The testimony shows the average physician in the United States does not require more than 400 one-quarter grain tablets annually for legitimate use. Although Tate's initial purchases in 1933 were smaller, they gradually increased until, from November, 1937, to January, 1940, they amounted to 79,000 one-half grain tablets. In the last six months of 1939, petitioner's shipments to him averaged 5,000 to 6,000 half-grain tablets a month, enough as the Government points out to enable him to give 400 average doses every day.

These quantity sales were in line with the general mail-order character of petitioner's business. By printed catalogues circulated about three times a month, it solicits orders from retail druggists and physicians located for the most part in small towns throughout the country. Of annual sales of from $300,000 to $350,000 in the period 1936 to 1940, about fifteen per cent by revenue and two-and-a-half per cent by volume were in narcotics. The mail-order plan enabled petitioner to sell at prices considerably lower than were charged by its larger competitors, who main-

---

tribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; . . . .'' 26 U. S. C. § 2553.

''It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.'' 26 U. S. C. § 2554(a).

''It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession.'' 26 U. S. C. § 2554(g).

tained sales forces and traveling representatives. By offering fifty per cent discounts on narcotics, it "pushed" quantity sales. Instead of listing narcotics, like morphine sulphate, in quantities not exceeding 100 tablets, as did many competitors, Direct Sales for some time listed them in 500, 1000 and 5000 tablet units. By this policy it attracted customers, including a disproportionately large group of physicians who had been convicted of violating the Harrison Act.

All this was not without warning, purpose or design. In 1936 the Bureau of Narcotics informed petitioner it was being used as a source of supply by convicted physicians.[4] The same agent also warned that the average physician would order no more than 200 to 400 quarter-grain tablets annually[5] and requested it to eliminate the listing of 5000 lots. It did so, but continued the 1000 and 500 lot listings at attractive discounts. It filled no more orders from Tate for more than 1000 tablets, but continued to supply him for that amount at half-grain strength. On one occasion in 1939 he ordered on one form 1000 half and 100 quarter grains. Petitioner sent him the 1000 and advised him to reorder the 100 on a separate order form. It attached to this letter a sticker printed in red suggesting anticipation of future needs and taking advantage of discounts offered. Three days later Tate ordered 1000 more tablets, which petitioner sent out. In 1940, at the Bureau's suggestion, Direct Sales eliminated its fifty and ten per cent discounts. But on doing so it translated its discount into its net price.

Tate distributed the drugs to and through addicts and purveyors, including Johnson, Black and Foster. Although he purchased from petitioner at less than two dollars, he sold at prices ranging from four to eight dollars per 100 half-grain tablets and purveyors from him charged addicts as much as $25 per hundred.

On this evidence, the Government insists the case is in different posture from that presented in *United States* v. *Falcone*,

[4] Thus, although there were more than 1350 wholesale drug dealers in the United States from whom physicians might order narcotics (Traffic in Opium and Other Dangerous Drugs for the Year Ended December 31, 1941, United States Treasury, Bureau of Narcotics), about 27% of the 204 doctors convicted were petitioner's customers.

[5] Testimony in the record establishes that the practice in the profession is to give one-eighth or one-fourth grain doses, and only rarely one-half grain doses. Cf. United States v. Berman, 258 U. S. 280, 289. Furthermore, there was expert testimony to the effect that codein may be, and preferably is, used for the same medical purposes as morphine sulphate. During the period from 1934 to 1940, however, the record does not show that Tate ever ordered codein from petitioner.

It urges that the effort there was to connect the respondents with a conspiracy between the distillers on the basis of the aiding and abetting statute.[6] The attempt failed because the Court held the evidence did not establish the respondents knew of the distillers' conspiracy. There was no attempt to link the supplier and the distiller in a conspiracy *inter sese*. But in this case that type of problem is presented. Direct Sales was tried, and its conviction has been sustained, according to the claim, on the theory it could be convicted only if it were found that it and Tate conspired together to subvert the order form provisions of the Harrison Act. As the brief puts the Government's view, "Petitioner's guilt was not made to depend at all upon any guilt of Dr. Tate growing out of his relationship to defendants other than petitioner or upon whether these other defendants were linked with the Tate-Direct Sales conspiracy."

On the other hand, petitioner asserts this case falls squarely within the facts and the ruling in the *Falcone* case. It insists there is no more to show conspiracy between itself and Tate than there was to show conspiracy between the respondent sellers and the purchasing distillers there. At most it urges, there were only legal sales by itself to Dr. Tate, accompanied by knowledge he was distributing goods illegally. But this, it contends, cannot amount to conspiracy on its part with him, since in the *Falcone* case the respondents sold to the distillers, knowing they would use the goods in illegal distillation.

Petitioner obviously misconstrues the effect of the *Falcone* decision in one respect. This is in regarding it as deciding that one who sells to another with knowledge that the buyer will use the article for an illegal purpose cannot, under any circumstances, be found guilty of conspiracy with the buyer to further his illegal end. The assumption seems to be that, under the ruling, so long as the seller does not know there is a conspiracy between the buyer and others, he cannot be guilty of conspiring with the buyer, to further the latter's illegal and known intended use, by selling goods to him.

The *Falcone* case creates no such sweeping insulation for sellers to known illicit users. That decision comes down merely to this, that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally. The Government did not contend, in those cir-

[6] R. S. § 5323, 18 U. S. C. § 550.

cumstances, as the opinion points out, that there was a conspiracy between the buyer and the seller alone. It conceded that on the evidence neither the act of supplying itself nor the other proof was of such a character as imported an agreement or concert of action between the buyer and the seller amounting to conspiracy. This was true, notwithstanding some of the respondents could be taken to know their customers would use the purchased goods in illegal distillation.

The scope of the concession must be measured in the light of the evidence with reference to which it was made. This related to both the volume of the sales and to casual and unexplained meetings of some of the respondents with others who were convicted as conspirators. The Court found this evidence too vague and uncertain to support a finding the respondents knew of the distillers' conspiracy, though not inadequate in some instances to sustain one that the seller knew the buyer would use the goods for illegal distilling. It must be taken also that the Government regarded the same evidence as insufficient to show the seller conspired directly with the buyer, by selling to him with knowledge of his intended illegal use.

Whether or not it was consistent in making this concession and in regarding the same evidence as sufficient to show that the sellers knew of and joined the buyers' distilling ring is not material. Nor need it be determined whether the Government conceded too much. We do not now undertake to say what the Court was not asked and therefore declined to say in the *Falcone* case, namely, that the evidence presented in that case was sufficient to sustain a finding of conspiracy between the seller and the buyer *inter sese*. For, regardless of that, the facts proved in this case show much more than the evidence did there.

The commodities sold there were articles of free commerce, sugar, cans, etc. They were not restricted as to sale by order form, registration, or other requirements. When they left the seller's stock and passed to the purchaser's hands, they were not in themselves restricted commodities, incapable of further legal use except by compliance with rigid regulations, such as apply to morphine sulphate. The difference is like that between toy pistols or hunting rifles and machine guns. All articles of commerce may be put to illegal ends. But all do not have inherently the same susceptibility to harmful and illegal use. Nor, by the same token, do all embody the same capacity, from their very nature, for giving the seller notice the buyer will use them unlawfully. Gangsters, not hunters or small boys, comprise the normal private market for machine guns. So drug addicts fur-

nish the normal outlet for morphine which gets outside the restricted channels of legitimate trade.

This difference is important for two purposes. One is for making certain that the seller knows the buyer's intended illegal use. The other is to show that by the sale he intends to further, promote and cooperate in it. This intent, when given effect by overt act, is the gist of conspiracy. While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist. *United States* v. *Falcone, supra.*[7] Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. *Ibid.* This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes.

The difference between sugar, cans, and other articles of normal trade, on the one hand, and narcotic drugs, machine guns and such restricted commodities, on the other, arising from the latters' inherent capacity for harm and from the very fact they are restricted, makes a difference in the quantity of proof required to show knowledge that the buyer will utilize the article unlawfully. Additional facts, such as quantity sales, high pressure sales methods, abnormal increases in the size of the buyer's purchases, etc., which would be wholly innocuous or not more than ground for suspicion in relation to unrestricted goods, may furnish conclusive evidence, in respect to restricted articles, that the seller knows the buyer has an illegal object and enterprise. Knowledge, equivocal and uncertain as to one, becomes sure as to the other. So far as knowledge is the foundation of intent, the latter thereby also becomes the more secure.

The difference in the commodities has a further bearing upon the existence and the proof of intent. There may be circumstances in which the evidence of knowledge is clear, yet the further step of finding the required intent cannot be taken. Concededly, not every instance of sale of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy.[8] But this is not to say that a seller of harmful restricted goods has license to sell in un-

[7] Although this principle was there applied to aiding and abetting a conspiracy among others, it has at least equal force in a situation where the charge is conspiring with another to further his unlawful conduct, without reference to any conspiracy between him and third persons.

[8] This may be true, for instance, of single or casual transactions, not amounting to a course of business, regular, sustained and prolonged, and involving nothing more on the seller's part than indifference to the buyer's

limited quantities, to stimulate such sales by all the high-pressure methods, legal if not always appropriate, in the sale of free commodities; and thereby bring about subversion of the order forms, which otherwise would protect him, and violation of the Act's other restrictions. Such a view would assume that the market for opiates may be developed as any other market. But that is not true. Mass advertising and bargain counter discounts are not appropriate to commodities so surrounded with restrictions. They do not create new legal demand and new classes of legitimate patrons, as they do for sugar, tobacco and other free commodities. Beyond narrow limits, the normal legal market for opiates is not capable of being extended by such methods. The primary effect is rather to create black markets for dope and to increase illegal demand and consumption.

When the evidence discloses such a system, working in prolonged cooperation with a physician's unlawful purpose to supply him with his stock in trade for his illicit enterprise, there is no legal obstacle to finding that the supplier not only knows and acquiesces, but joins both mind and hand with him to make its accomplishment possible. The step from knowledge to intent and agreement may be taken. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is informed and interested cooperation, stimulation, instigation. And there is also a "stake in the venture" which, even if it may not be essential, is not irrelevant to the question of conspiracy.[9] Petitioner's stake here was in making the profits which it knew could come only from its encouragement of Tate's illicit operations. In such a posture the case does not fall doubtfully outside either the shadowy border between lawful cooperation and criminal association or the no less elusive line which separates conspiracy from overlapping forms of criminal cooperation.

Unless, therefore, petitioner has been exempted arbitrarily by the statute's terms, the evidence clearly was sufficient to sustain

---

illegal purpose and passive acquiescence in his desire to purchase, for whatever end. A considerable degree of carelessness coupled with casual transactions is tolerable outside the boundary of conspiracy. There may be also a fairly broad latitude of immunity for a more continuous course of sales, made either with strong suspicion of the buyer's wrongful use or with knowledge, but without stimulation or active incitement to purchase.

[9] Cf. United States v. Falcone, 109 F. 2d 581 (C. C. A.); and compare Backun v. United States, 112 F. 2d 635, 637 (C. C. A.); United States v. Harrison, 121 F. 2d 930, 933 (C. C. A.); United States v. Pecoraro, 115 F. 2d 245, 246 (C. C. A.).

its conviction for conspiring with Tate. Its position here comes down ultimately to the view alluded to above that the statute has, in fact, thus immunized its action. In effect this means the only restriction imposed upon it, apart from other provisions not now material, such as those affecting registration, was the requirement it should receive from purchasing physicians a signed order form for each sale. That done, in its view, its full duty to the law was fulfilled, it acquired a complete immunity, and what the physician had done or might do with the drugs became of no further concern to itself. Such a view would legalize an express written agreement between a registered wholesaler and a physician for the former to supply him with all his requirements for drugs for both legal and illegal distribution, conditioned only upon his using the required order forms. The statute contains no such exemption in explicit terms. Nor was one implied.[10]

This being true, it can make no difference the agreement was a tacit understanding, created by a long course of conduct and executed in the same way.[11] Not the form or manner in which the understanding is made, but the fact of its existence and the further one of making it effective by overt conduct are the crucial matters. The proof, by the very nature of the crime, must be circumstantial[12] and therefore inferential to an extent varying with the conditions under which the crime may be committed. But this does not mean either that the evidence may be equivocal or that petitioner is exempt from its effects when it is not so, merely because in the absence of excesses such as were committed and in other circumstances the order form would have given it protection. It follows the mere fact that none of petitioner's representatives ever met Dr. Tate face to face or held personal communion with him is immaterial. Conspiracies, in short, can be committed by mail and by mail-order houses. This is true, notwithstanding the overt acts consist solely of sales, which but for their volume, frequency and prolonged repetition, coupled with the seller's unlawful intent to further the buyer's project, would be wholly lawful transactions.

Accordingly, the judgment is

Affirmed.

---

[10] Cf. Gebardi v. United States, 287 U. S. 112; see also 81 U. of Pa. L. Rev. 474.

[11] Glasser v. United States, 315 U. S. 60, 80; United States v. Manton, 107 F. 2d 834, 839 (C. C. A.); United States v. Harrison, 121 F. 2d 936, 934 (C. C. A.); cf. Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U. S. 600; Interstate Circuit, Inc. v. United States, 306 U. S. 208.

[12] *Ibid.*